Public Prosecutor v Zulkipli bin Othman & Ors

HIGH COURT (KUANTAN) — CRIMINAL TRIALS NO 45–3 OF 2002 AND 45–5 OF 2002
MOHAMED APANDI ALI J
10 JANUARY 2005

Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Whether prosecution had proved their case beyond reasonable doubt— Dangerous Drugs Act 1952 s 39B(1)(a)

Criminal Law — Dangerous drugs 39B(1)(a) — Trafficking in dangerous drugs — Presumption of trafficking — Whether the accused rebutted statutory presumption — Dangerous Drugs Act 1952 ss 37(da) & 39B(1)(a)

Evidence — Information leading to fact discovered — Information had to lead to discovery — Whether information could be admitted as evidence — Whether trial judge had discretion to exclude information — Whether trial judge had correctly exercised his discretion — Evidence Act 1950 s 27

The accused was originally charged jointly with two others for possession of cannabis, an offence under s 6 of the Dangerous Drugs Act 1952 ('the Act'); and was also charged with one of the other co-accused for trafficking of cannabis, an offence under s 39B(1)(a) of the Act. Both the charges were jointly tried. At the end of the case for the prosecution, the two other co-accused were acquitted and discharged on both charges and the accused was called upon to enter his defence. At the end of the trial, the accused was found guilty for both offences.

Held, convicting the accused and imposing the mandatory death sentence:

(1) Since the matter fell under the category of exercising the court's discretion, and in the name of fairness, and in view of the deputy public prosecutor having agreed that a trial within trial will not prejudice the prosecution, the court found that in order to exercise its discretion to maintain or exclude the evidence of information leading to discovery under s 27 of the Evidence Act 1950, which had already been recorded at this trial, it was proper, fair and appropriate to have a trial within a trial (see para 13).

(2) Having concluded that since evidence leading to discovery fell under s 27 of the Evidence Act 1950 and having recorded such evidence, following the case of *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507, the court has to exercise a discretion to admit or to reject such evidence and see to it that the legitimate interest, of both parties were adequately provided (see para 15).

(3) After going through the notes of evidence, at the end of the trial and in particular after testing the defence story as against the case for the prosecution and in compliance with the provision of s 173(m)(i) of the

Criminal Procedure Code, the court found that the prosecution had proved its case beyond reasonable doubt. The defence's story was just bare denials (see para 34).

(4) The defence story also, failed on a balance of probabilities to rebut the presumption of trafficking under s 37(da) of the Act (see para 40).

(5) The accused was found guilty in respect of both charges and was convicted. The court sentenced the accused to two years imprisonment, with effect from date of arrest, in respect of the offence under s 6 of the Act, and handed out the mandatory sentence of death, by hanging, in respect of the offence under s 39B(1)(a) of the Act (see para 41).

[**Bahasa Malaysia summary**

Tertuduh pada mulanya didakwa bersama dua tertuduh lain untuk milikan kanabis, satu kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 ('Akta tersebut'); dan juga didakwa dengan seorang tertuduh bersama untuk pengedaran kanabis, satu kesalahan di bawah s 39B(1)(a) Akta tersebut. Kedua-dua dakwaan itu didengar bersama. Pada akhir kes pendakwa atas kedua-dua dakwaan itu, tertuduh dipanggil untuk memasuki pembelaannya. Pada akhir pembicaraan, tertuduh didapati bersalah untuk kedua-dua kesalahan itu.

Diputuskan, mensabitkan tertuduh dan menjatuhkan hukuman mati mandatori:

(1) Oleh kerana perkara ini jatuh di bawah kategori di mana budi bicara mahkamah perlu digunakan, atas nama keadilan, pada pendapat timbalan pendakwa raya yang bersetuju bahawa satu perbicaraan dalam perbicaraan tidak akan memprejudiskan pendakwa, mahkamah mendapati bahawa dalam menggunakan budi bicaranya untuk sama ada mengekalkan atau mengecualikan keterangan informasi yang menghasilkan penemuan dibawah s 27 Akta Keterangan 1950, yang telah pun direkodkan dalam pembicaraan ini, ia adalah betul, adil dan sesuai untuk mengadakan satu pembicaraan dalam pembicaraan (lihat perenggan 13).

(2) Setelah memutuskan bahawa keterangan telah menghasilkan penemuan di bawah s 27 Akta Keterangan 1950 dan setelah merekodkan keterangan ini, mengikut kes *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507, mahkamah mesti menggunakan budi bicaranya untuk membenarkan atau menolak keterangan ini dan memastikan bahawa kepentingan sah kedua-dua pihak dipertimbangkan dengan secukupnya (lihat perenggan 15).

(3) Setelah meneliti nota-nota keterangan, pada akhir pembicaraan dan terutamanya selepas membandingkan kes pembelaan terhadap kes pendakwa dan menurut peruntukan s 173(m)(i) Kanun Acara Jenayah, mahkamah mendapati bahawa pendakwa telah membuktikan kesnya

tanpa keraguan yang munasabah. Kes pembelaan mengandungi sekadar penafian sahaja (lihat perenggan 34).

(4) Kes pembelaan juga gagal, atas keseimbangan kebarangkalian untuk membangkang anggapan pengedaran di bawab s 37(da) Akta tersebut (lihat perenggan 40).

(5) Tertuduh didapati bersalah untuk kedua-dua tertuduh itu dan telah disabit. Mahkamah menghukumkan tertuduh dengan dua tahun penjara, bermula dari tarikh ditangkap, berkenaan dengan kesalahan di bawah s 6 Akta itu, dan menjatuhkan hukuman mati mandatori, secara gantung, berkenaan dengan kesalahan di bawah s 39B(1)(a) Akta tersebut (lihat perenggan 41).]

Notes

For cases on information given by accused, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1634–1638.

For cases on s 39B Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 135–454.

Cases referred to

Alcontara Ambross Antony v PP [1996] 1 MLJ 209 (refd)
Chan Pean Leong v PP [1956] 22 MLJ 237 (refd)
Ganapathy v PP [1998] 2 MLJ 577 (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507 (refd)
Hasamuddin bin Talena v PP [2002] 2 MLJ 408 (refd)
Kesavan a/l Petchayo @ Balakrishnan v PP [2003] 2 MLJ 209 (refd)
Kiew Foo Mui & Ors v PP [1995] 3 MLJ 505 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Md Desa bin Hashim v PP [1995] 3 MLJ 350 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
PP v Er Ah Kiat [1966] 1 MLJ 10 (refd)
PP v Gurdial Singh [2003] 1 CLJ 37 (refd)
PP v Johar bin Mustafa [2003] MLJU 342 (refd)
PP v Karim bin Othman [1993] MLJU 40 (refd)
PP v Letchumanan [2000] 4 MLJ 449 (refd)
PP v Mohamad Musa bin Amarullah [2002] 1 MLJ 561 (refd)
PP v Mohd Farid bin Mohd Sukis [2002] 3 MLJ 401 (refd)
PP v Reza Mohd Shah bin Ahmad Shah [2002] 4 MJL 13 (refd)
PP v Toh Ah Keat [1977] 2 MLJ 87 (refd)

Legislation referred to

Criminal Procedure Code ss 158(1), 173(f), (m)(i)
Dangerous Drugs Act 1952 ss 2, 6, 37(da), (vi), 39B, (1)(a), (2)
Evidence Act 1950 ss 24, 27
Penal Code s 34

Ahmad Rosli bin Mohd Sham (Deputy Public Prosecutor) (Attorney General's Chambers) for the prosecution.

Syed Azimal Amir bin Syed Abu Bakar (Rizal bin Chek Hashim) (Syed Azimal, Ramli & Rizal) for the accussed.

Mohamed Apandi Ali J:

[1] The accused was originally charged jointly with two others for possession of 13.7 grammes of cannabis, an offence under s 6 of the Dangerous Drugs Act 1952; and was also charged with one of the other co-accused for trafficking 237.4 grammes of cannabis, an offence under s 39B(1)(a) of the same Act.

[2] The charges were as follows:

(1) First charge:

> Bahawa kamu, Zulkipli bin Othman, No KP: 740514–11–5459, Khairul Anuar bin Bakar No KP: 720628–06–5447 dan Mohd Foat bin Bakar No KP: 8202–06–5111.
>
> pada 16 Mei 2001, jam lebih kurang 12.30 tgh mlm, di sebuah rumah beralamat No P 459 U Kuarters Politeknik Sultan Hj Ahmad Shah, Semambu, dalam Daerah Kuantan, di dalam Negeri Pahang Darul Makmur, di dalam melaksanakan niat umum bersama, didapati mengawal dadah berbahaya cannabis berat 13.9 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 (Pindaan 1998) dan boleh dihukum di bawah seksyen yang sama dengan dibaca bersama s 34 Kanun Keseksaan.

(2) Second charge:

> Bahawa kamu, Zulkipli bin Othman No KP: 740514–11–5499 dan Khairul Anuar bin Bakar No KP: 720628–06–5447, pada 16 Mei 2001, jam lebih kurang 12.30 tgh mlm, di sebuah rumah beralamat No P 459 U Kuarters Politeknik Sultan Hj Ahmad Shah Semambu, dalam Daerah Kuatan, di dalam Negeri Pahang Darul Makmur, di dalam melaksanakan niat umum bersama, di dapati mengedar dadah berbahaya cannabis 237.4 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 39b(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39b(2) Akta yang sama dengan dibaca bersama-sama s 34 Kanun Keseksaan.

[3] Both the charges were jointly tried. At the end of the case for the prosecution, the two other co-accused were acquitted and discharged on both charges and the accused was called upon to enter his defence. The prosecution did not file any notice of appeal in respect of the acquittals of the two co-accused. At end of the trial, the accused was found guilty for both offences.

The accused is now appealing against the conviction and sentence in respect of the offence under s 39B of the Dangerous Drugs Act 1952 only. There is no appeal against the conviction and sentence under s 6 of the Dangerous Drugs Act 1952.

BRIEF FACTS OF ARREST

[4] Briefly stated, the facts of the case are that on 16 May 2001, Chief Inspector Azhar bin Ahmad (SP1) led a party of police personnels consisting of D/Sgt Haridan Abd Hamid, D/Cpl Ahmad; D/L/Cpl Shaimee and D/L/Cpl Rosmawi and raided a premise known as P459 U Quarters Polytechnic, Semambu, Kuantan, Pahang. It was an apartment-like premises situated on the third floor of a block of housing quarters for the polytechnic's staff. It was about 12.30 in the morning. Upon peeping through the window, SP1 saw three persons watching TV.

[5] SP1 knocked on the door and identified himself as police. The accused was seen running towards the back. The police kicked the door, entered and arrested all the three occupiers. The accused was arrested at the back verandah of the apartment and the other two at the hall. The police searched the arrested persons, found nothing but upon searching the premises found three small packages containing dried leaves suspected to be cannabis, in the hall. The three persons were then hand-cuffed and SP1 conducted an impromtu questioning of the arrestees as to the where-about of anymore cannabis. Out of the three arrestees, only the accused responded to the question and gave information leading to the discovery of cannabis at the premises (No P459V) adjacent to the premises they were occupying.

INFORMATION LEADING TO DISCOVERY

[6] In consequence of the information given, the accused took a key to the adjacent premises and led the police party into a room at the said premises and took a bag and handed it to SP1. In the bag there are five plastic packages, each containing 10 smaller plastic packages; altogether 50 small plastic packages, containing dried leaves suspected to be cannabis.

[7] In the course of the evidence of SP1, the information leading to discovery was in respond to the pertinent question posed by SP1 and the answer given by the accused are as recorded in the notes of evidence as follows:

> Soalan yang di tanya: Mana lagi ganja?
>
> Jawapan yang diberi oleh Zulkipli: Saya ada simpan sedikit lagi ganja dirumah sebelah yang tiada penghuni.

[8] Learned counsel for the appellant objected to the admission of the said recorded answer as it involves the issue of voluntariness, and quoted the case of *Public Prosecutor v Gurdial Singh* [2003] 1 CLJ 37 to support his contention to

have a *voir dire*. Counsel also suggested that the procedure adapted in *Public Prosecutor v Mohd Farid bin Mohd Sukis* [2002] 3 MLJ 401 should be adopted and that a trial within a trial be held. The learned deputy public prosecutor argued that a *voir dire* is not necessary and cited *Public Prosecutor v Mohamad Musa Amarullah* [2002] 1 MLJ 561. The learned defence counsel countered that despite the different provisions of ss 27 and 24 of the Evidence Act 1950 only when a statement is a confession then there must be a trial within a trial, citing *Md Desabin Hashim v Public Prosecutor* [1995] 3 MLJ 350 as authority.

[9] The issue raised by counsel is whether a trial within trial ought to be held for purposes of evidence to be admitted under s 27 of the Evidence Act 1950. After hearing out the arguement of both sides, the court made the following ruling (as recorded in the notes of evidence):

Court's ruling:

After hearing submissions from both sides, and after reading the relevant case law, I find that:

(1) The Federal Court case of *Md Desa* ruled that s 27 Evidence Act was subject to s 24 Evidence Act and therefore it must be voluntary. To determine voluntariness the court held that a trial within a trial must be held.

(2) The Federal Court in the case of *Goi Ching Ang*overruled *Md Desa* to the extent that s 27 Evidence Act is independent of s 24. The Federal Court also added that s 27 is an exception to s 24. Nevertheless the court held that court has the discretion to admit or reject the evidence of information under s 27 and based on such discretion on the fairness, whereby the legitimate interests of both the prosecution and the defence are adequately provided (see [1999] 1 MLJ 507).

(3) The interesting part is that the Federal Court in *Goi Ching Ang* agreed with *Md Desa* that as a matter of policy, of the desirability as to the voluntariness of s 27 information (see [1999] 1 MLJ 507).

[10] After reading the two binding Federal Court decisions above and after having the guidance and persuasions in subsequent case law such as *Public Prosecutor v Mohamad Musa bin Amarullah* [2002] 1 MLJ 561; *PP v Gurdial Singh* [2003] 1 CLJ 37, *PP v Mohd Farid* [2002] 3 MLJ 401; *Kesavan a/l Petchayo @ Balakrishnan v Public Prosecutor* [2003] 2 MLJ 209; and *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408, I find that:

[11] In the case of *Goi Ching Ang*, while it categorically held that evidence of information under s 27 is admissible because it is independent of s 24, the case was silent as to how to go about in exercising the discretion to admit or reject the evidence. This probably gave rise to the seemingly conflicting decisions in *PP v Gurdial* (where the learned judge held that *Md Desa* is still the binding authority on the need to have a *voir dire*) and in *Public Prosecutor v Mohamad Musa*

bin Amarullah (where the learned judge applying strictly the decision of *Goi Ching Ang* and held that a *voir dire* is not required).

[12] In *Public Prosecutor v Mohd Farid*, the learned judge while following *Goi Ching Ang* in admitting the evidence of information under s 27 without holding a trial within a trial, held that in view of the need to exercise discretion to exclude such evidence decided that a trial within a trial need to be held. This was done after the evidence under s 27 was admitted, and the onus during the trial within the trial is upon the accused person to show, on the balance of probabilities, that the evidence should be excluded.

[13] Since the matter falls under the category of exercising my discretion, and in the name of fairness, and in view of the learned deputy public prosecutor agreeing that a trial within trial will not prejudice the prosecution, I hereby rule that in order to exercise my discretion to maintain or exclude the evidence of information leading to discovery under s 27 of the Evidence Act, which has already been recorded at this trial, it is proper, fair and appropriate to have a trial within a trial. In making this ruling I also took onto consideration of the fact that all the accused persons were questioned and interrogated after the arrest was made and while in hand-cuffs.

[14] Burden of proof in trial within trial adalah terletak pada OKT — kerana adalah dakwaan mereka keterangan yang telah diterima (di bawah s 27) perlu diketepikan. Oleh itu pihak defence perlu beri keterangan dahulu.

[15] Having concluded that since evidence leading to discovery falls under the provision of s 27 of the Evidence Act and having recorded such evidence, following the case of *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507, the court has to exercise a discretion to admit (in this case, to maintain) or to reject such evidence and see to it that the legitimate interest, of both parties are adequately provided.

[16] To exercise such discretion, a trial within a trial was held. As the evidence under s 27 of the Evidence Act has already been admitted, in the trial within a trial, the burden of proof was shifted to the accused to prove that such evidence ought to be rejected. After hearing submissions from both parties, the court reserved the decision of the trial within trial until the end of the prosecution's case and proceeded to hear the evidence of other witnesses in the main trial.

DECISION AT THE END OF PROSECUTION CASE

[17] After calling eight witnesses, including members of the raiding party, investigations officer, and the chemist, the prosecution closed its case. Before making the decision at the close of the prosecution's case, the court ruled that the evidence of information leading to discovery as admitted under s 27 of the Evidence Act can be retained and forms part of the prosecution's case.

[18] At the end of the case for prosecution, the court made the following conclusion:

(a) There is not an iota of evidence to prove common intention, under s 34 of the Penal Code, which was incorporated in the charge.

(b) that there was no evidence to connect the second accused and the third accused with the cannabis found, either at the premises occupied or at the unoccupied premises;

(c) that there are sufficient *prima facie* evidence against the first accused.

[19] Wherefore at the end of the case for prosecution, the first accused (the appellant) was called upon to enter his defence on both charges and both the second and third accused persons were acquitted and discharged without calling for their defence.

[20] The finding of a *prima facie* case against the first accused is based, briefly, on the following facts:

(1) The information given to the police by first accused led to the discovery of the cannabis at the adjacent premises;

(2) The cannabis found in a bag is connected with the three small plastic packages containing cannabis found earlier at the premises occupied by the first accused and the two other accused as the answer given to the question posed 'mana lagi ganja', was made after the discovery of the first three plastic packages. The subsequent discovery of a much larger amount of cannabis is correlated to the earlier smaller discovery, as the answer given was an immediate respond to a question uttered contemporaneously with the said earlier discovery of cannabis. There is a nexus between the three packages and the 50 packages recovered later.

(3) The first accused person had not only given information leading to the discovery of the cannabis, but had led police to the adjacent premise and retrieved the bag containing the 50 packages of cannabis.

(4) The nexus between the three small packages and the 50 small packages, besides the contemporaneous timing of information leading to discovery, is further bonded by the fact that all the small plastic packages are similar in shape and size. As such by giving such information and later retrieving the bag containing 50 such packages clearly denotes the 'animus possidendi' of the first accused with all the cannabis, namely in the packages discovered and the packages retrieved.

(5) The retrieval of the bag containing the 50 packages of cannabis is direct evidence of control, knowledge and possession of the drugs by the first accused. The proof of the elements of control, knowledge and possession can be analogously compared to cases of similar modes of discovery and retrieval in cases involving firearms, in the cases of:

Public Prosecutor v Er Ah Kiat [1966] 1 MLJ 10

Public Prosecutor v Toh Ah Keat [1977] 2 MLJ 87

Chan Pean Leong v Public Prosecutor [1956] 22 MLJ 237

(6) The defence did not seriously challenge the evidence of the chemist (SP8) as to the nature of drugs and the weight therein.

(7) From submissions made by learned Counsel, there seems to be no submissions on other issues such as identification or broken-chain of evidence.

[21] Having found the first accused to be in possession of the 50 small packages in the bag coupled with the manner of the recovery of the said bag, I find that there is direct evidence of trafficking. Section 2 of the Dangerous Drugs Act 1952, defines 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;' There are 18 acts that can be construed to be trafficking, and as the definition reads 'the doing of any of the following acts', any single act will suffice to say that one is trafficking in drugs. From the facts adduced, the are three acts that are attributable to the first accused namely 'keeping'; 'concealing' and 'storing'. A fortiori, why would one keeps, conceals and store some 50 similar small packages of cannabis if it is not for purposes of distribution and trafficking.

[22] However even without such direction evidence as stated about, the fact that the first accused was found to be in possession of more than 200 grammes of cannabis, by law the rebuttable resumption of trafficking under s 37(da)(vi) of the Dangerous Drug Act 1952 is triggered and can be invoked against the first accused.

[23] The finding of a *prima facie* case against the first accused is after giving due evaluation of the evidence adduced by the prosecution as required under the provisions of s 173(f) of the Criminal Procedure Code and also as guided by the Court of Appeal decision in the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65.

[24] In view of the absence of the element of common intention under s 34 of the Penal Code, which earlier forms part of the charges against the first accused, the charges were then according amended under the provisions of s158(1) Criminal Procedure Code. The accused was then called upon to enter his defence on the amended charges.

THE DEFENCE STORY:

[25] The accused testified that he has been staying at the quarters of the Polytechnic occupied by the second accused , Khairul Anuar for the past two years prior to his arrest on 16 May 2001. He was given the key to the said premises. He was a fishmonger, with a daily routine of going out at about 7.30am and coming back at about 6pm. The accused knew that the neighbouring quarters were vacant and also knew that Khairul Anuar has the key to one of the vacant quarters and that key is at the wall near the table in the premises that both of them occupy. The accused denied ever using the vacant premises.

[26] On 15 January 2001, the accused went out to work as usual but came back earlier at 3.30pm, because Khairul Anuar asked him to go back early as two of his friends by the names of Mohd Noor and Kechik were coming to their premises. Upon arrival at the premises, both Mohd Noor and Kechik were already there, in the hall of the premises. After a while, Mohd Noor asked for the key to the next-door premises. Mohd Noor then took the key and went to the next-door premises, carrying with him a small brown bag ('bag office'). Mohd Noor then came back with the key and told the accused that he had kept the bag in the nextdoor premises and asked the accused to keep on eye on the bag. Khairul Anuar came back at about 4.30pm and the accused left the premises at 4.50pm and came back later at about 11.45pm, on the same day.

[27] Upon his return to the premises at 11.45pm, he found that Khairul Anuar was watching TV with his brother, Mohd Foat (the third accused) who just came to the premises. At 12 mid-night, some one knocked on the door and the accused asked Mohd Foat to open the door. Before the door could be opened, the door was kicked open, and two men rushed in. The accused felt frightened and ran towards the back. He heard the words 'polis' and 'jangan lari' before the door was kicked open. The accused admitted that after being questioned about ganja he admitted saying 'ada dirumah sebelah, tetapi tidak tahu kat mana'. According to the accused, the police party themselves took them (the accused and Khairul Anuar) together with the key, to the next-door premises and with the aid of lighters, the police party themselves recovered the bag (P9). He denied ever showing where the bag was hidden to the police.

[28] The accused denied having anything to do either with the three plastic packages found earlier in their premises or the bag containing the drugs. Accused further said that the bag (P9) was the one earlier brought by Mohd Noor and Kechik.

[29] During cross-examination by the learned deputy public prosecutor, the accused said that Mohd Noor and Kechik are frequent visitors. He said that he did not tell Khairul Anuar about the bag. He also did not tell the raiding officer, Insp Azhar about them because he was not asked. During re-examination, the accused further said that when Insp Azhar showed him the contents of

the bag, he was not asked about the owner of the bag nor about the person who brought the bag.

[30] The next defence witness was Khairul Anuar (DW2). He corroborated the accused story about the visit by his friends Mohd Noor and Kechik on 15January 2001. They came by car and Mohd Noor brought up one sport bag at the time of their arrival at 12.10pm but said that he had another bag which was still in the car, and than he wanted to temporarily place that bag with him. DW2 went back to work and called the accused to tell him of the visitors. DW2 never saw the bag and make no further mention of it, even after coming back at about 4.30pm and leaving the premises again later at 5pm to fetch his brother, Mohd Foat in Pekan. He left Mohd Noor at the premises, and asked Mohd Noor to leave the key to the premises on the door frame. When DW2 came back with his brother at 9.30pm, nobody was at home. The rest of DW2's story about the arrival of police and the recovery of the bag at the premises next-door was the same with the accused's story. DW2 also stated that after their arrest (together with the 1st accused and his brother) the police did not ask about the ownership of the recovered bag.

[31] During cross-examination, DW2 denied any knowledge of the three plastic packages found in his premises, and alleged that it was placed on the TV cabinet by one member of the police raiding party. DW2 admitted that before the police rushed into his premises, they did knocked on the door.

CONCLUSION A THE END OF TRIAL

[32] At the end of the trial, learned counsel for the accused submitted that there was no possession by the accused of the cannabis that was discovered and that to prove trafficking there must be a sale transaction to another party. Learned counsel also submitted that mere knowledge is not possession and that there is no exclusive control of the premises by the accused person and further submitted along the lines in the case of *Ganapathy v Public Prosecutor* [1998] 2 MLJ 577, that there are many questions that remained unanswered, namely who brought the cannabis to the premises?, and who was the last person that held the bag?

[33] The learned deputy public prosecutor replied by submitting that there is direct evidence of trafficking and that there is sufficient evidence to denote knowledge and control.

[34] After going through the notes of evidence, at the end of the trial and in particular after testing the defence story as against the case for the prosecution and in compliance with the provision of s 173(m)(i) of the Criminal Procedure Code, I find that the prosecution has proved its case beyond reasonable doubt. I find that the defence story are just bare denials.

[35] The story of the two visitors, Mohd Noor and Kechik who brought the bag (P9) is an after-thought and a concocted tale. This is so because the two names were only brought up during the defence; it was never put to any of the prosecution witnesses. (See the case of *Alcontara Ambross Antony v Public Prosecutor* [1996] 1 MLJ 209, on the late disclosure of defence). The defence also tried to bolster such story by saying that the names were not mentioned earlier to the police because the accused was never asked any question that will surface the intended answer. It is a matter of common sense and a most reasonable reaction for the accused to explain (if true) about how the bag came into existence, without having to wait for questions. But alas, no such contemporaneous explanation ever did came out from the accused when confronted by the question 'mana lagi ganja?'

[36] I also find it difficult to swallow the story that the bag (P9) was discovered by the police without any assistance of the accused. Such allegation tantamount to a frame-up by the police. There is no evidence to indicate even a slightest reason why the police would want to frame the accused, particularly more in a capital punishment offence as in this case.

[37] The learned counsel's submission on exclusive control of the premises and that mere knowledge is not possession will only hold water if there is no evidence of information leading to discovery under s 27 of the Evidence Act and the consequential retrieval of the bagful of cannabis by the accused.

[38] Furthermore the act of the accused in trying to run away at the presence and approach of the police at the place of arrest, do contribute to a certain degree to the cumulative effect of circumstantial evidence in ascertaining guilty knowledge on the part of the accused. At the very least it constitute a reasonable inference from the situation that the accused had knowledge of the offending drugs, that was later discovered. There is a nexus between the conduct of the accused, his flight and the offence. Despite the Supreme Court decision in *Kiew Foo Mui & Ors v PP* [1995] 3 MLJ 505 (which can be distinquished) where it was held that evidence of fleeing from the scene of crime as inadmissible evidence because it may amount to evidence of bad character, it would not be improper in this case to admit the evidence of any action of flight of the accused in the face of arrest as such action has a nexus with the offence. Such elaboration on the nexus between the flight of the accused and the offence can be seen in the cases of:

(1) *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705;

(2) *Public Prosecutor v Letchumanan* [2000] 4 MLJ 449;

(3) *Public Prosecutor v Johar bin Mustafa* [2003] MLJU 342;

(4) *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MJL 13.

[39] It is also worthy to note that the factual matrix of this case has on uncanny similarity with the unreported case of Kuantan High Court Criminal Trial No 47–1 of 1990: *PP v Karim bin Othman* [1993] MLJU 40 where YA Lamin J (as he then was) applied the provisions of s 27 Evidence Act, when the accused gave information (after a chase) leading to discovery. The question posed in that case was recorded as follows: 'Ada lagi tak baki ganja yang awak simpan?' The accused replied, 'Saya ada simpan baki ganja dalam seluar ditepi dinding dan bawah kayu ditepi pondok' The learned trial judge also dismissed the notion that by asking such a question, the police already had knowledge of the cannabis. The accused person was found guilty and sentenced to death.

[40] The defence story also, failed on a balance of probabilities to rebut the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952.

[41] As such, I therefore found the accused guilty in respect of both charges and convicted him. Accordingly I sentence the accused to two years imprisonment, with effect from date of arrest, in respect of the offence under s 6 of the Dangerous Drugs Act 1952, and handed out the mandatory sentence of death, by hanging, in respect of the offence under s 39B(1)(a) of the Dangerous Drugs Act 1952.

Accused convicted and sentenced to death.

Reported by Peter Ling